Supreme Court, U.S.
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No. _____

In The Supreme Court of the United States

MARION BROOKS PERSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether impeachment of a testifying defendant and of his character witnesses by means of inquiries relating to prior homosexual acts by the defendant, to the defendant's prior arrest for "crimes against nature," and to certain other instances of allegedly unlawful conduct occurring twenty-six (26) years prior to trial violated the fundamental right to a fair trial in a fair tribunal?

II. Whether a trial court's failure or refusal to conduct an evidentiary hearing which included an opportunity for confrontation of the witnesses concerning the Petitioner's competency denied petitioner's constitutional and statutory rights?

III. Whether a trial court has an affirmative or independent duty when alerted by objection from a defendant to ensure that criminal defendants receive a trial that is fair and does not contravene the Sixth Amendment, and, thus, whether the District Court erred and denied the defendant his constitutional right to due process by failing to conduct an evidentiary hearing into whether counsel's potential conflict of interest would interfere with the defendant's right to a fair trial and by failing to ensure that the defendant had knowingly, intelligently and voluntarily waived his right to be represented by counsel who is without conflict of interest?

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CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is unpublished, but reported in the table of unpublished dispositions at 205 F.3d 1336 (4th Cir. 2000), and is reprinted in the appendix. Similarly, the Judgment of the District Court for the Eastern District of North Carolina is not published. It is not reported, but is referenced in the Court of Appeals in the Appendix.

JURISDICTIONAL STATEMENT

This petition for writ of certiorari arises from an opinion rendered by the United States Court of Appeals for the Fourth Circuit, resulting from an appeal from United States District Court for the Eastern District of North Carolina. The Petitioner, Marion Brooks Person, was indicted on August 20, 1996, by a federal Grand Jury in the Eastern District of North Carolina on one count of conspiracy to possess with the intent to distribute and to distribute marijuana and cocaine in violation of 21 U.S.C. §841(a)(1). Upon motion of the United States, the trial court dismissed that indictment.

On April 3, 1997, a superseding indictment was filed in the Eastern District of North Carolina, charging Petitioner with one count of conspiracy to possess with the intent to distribute and to distribute marijuana and cocaine in violation of 21 U.S.C. §841(a)(1). Petitioner was subsequently convicted of the conspiracy.

The United States District Court for the Eastern District of North Carolina enjoyed original jurisdiction

over the matter pursuant to the authority vested in 18 U.S.C. § 3231 because the superseding indictment alleged violations of federal law and, therefore, arose under the laws of the United States. After the return of a jury verdict of guilt, the District Court rendered judgment on July 21, 1997.

On July 28, 1997, the Petitioner filed Notice of Appeal. The United States Court of Appeals for the Fourth Circuit heard this case on November 30, 1999, pursuant to its jurisdiction over appeals from final decisions of the district courts of the United States, such jurisdiction having been granted under 28 U.S.C. § 1291. The case was decided on February 28, 2000.

The Petitioner now submits a timely petition for writ of certiorari. The United States Supreme Court enjoys jurisdiction to review the judgment of the Fourth Circuit Court of Appeals pursuant to the authority granted under 28 U.S.C. § 1254(l), based upon Petitioner's submission that (1) this case presents important questions of federal law which have not been, but should be, settled by this Court; (2) this case presents questions of federal law upon which the United States Courts of Appeals for various Circuits have rendered conflicting interpretations; and (3) the United States Court of Appeals for the Fourth Circuit has decided an important question of federal law that has not been, but should be, settled by this Court, and has decided an important federal question in a way that conflicts with relevant decisions of this Court.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

United States Constitution, Amendment VI, provides in pertinent part: "In all criminal prosecutions the accused shall enjoy the right . . . to have the assistance of counsel for his defence."

United States Constitution, Amendment V, provides in pertinent part: "No person . . .shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . .."

Rule 403 of the Federal Rules of Evidence provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 608(b) of the Federal Rules of Evidence provides in pertinent part:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of a crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of

> truthfulness or untruthfulness be inquired into on cross examination of the witness . . . concerning the character for truthfulness or untruthfulness of another witness . . ..

Rule 609 of the Federal Rules of Evidence provides in pertinent part:

> For the purpose of attacking the credibility of a witness, evidence that a witness (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence out-weighs its prejudicial effect to the accused . . .. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

18 U.S.C. § 4241(a) provides:

> At any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, the defendant or the attorney for the Government may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion, or shall order a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.

Section 4241(c) further provides that any such hearing "shall be conducted pursuant to the provisions of section 4247(d)." 18 U.S.C. § 4241(c).

Rule 44(c) of the Federal Rules of Criminal Procedure provides, in pertinent part:

> Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally

advise each defendant of the right to the effective assistance of counsel, including separate representation.

Fed.R.Crim.P., Rule 44(c).

STATEMENT OF THE CASE

On August 20, 1996, the Petitioner, Marion Brooks Person, was indicted in the Eastern District of North Carolina on One (1) Count of Conspiracy to Possess with the Intent to Distribute and to Distribute Marijuana and Cocaine in violation of 21 U.S.C. § 841(a)(1). A superceding indictment containing the same charges was later issued and, commencing on April 22, 1997, Petitioner was tried on these charges.

On April 25, 1997, the jury returned a verdict of guilty. The Honorable James C. Fox entered final judgment against the Petitioner on July 21, 1997, sentencing the Petitioner to one hundred fifty-one (151) months imprisonment and five (5) years supervised release. The Petitioner gave timely Notice of Appeal on July 28, 1997.

At trial and on appeal the Petitioner challenged certain evidentiary rulings by the trial court which allowed the government to inquire on cross examination of the Petitioner and other witnesses as to extrinsic acts of the Petitioner concerning his arrest for homosexual activities and his earlier resignation as Clerk of Superior Court for allegedly "fixing" traffic tickets. Additionally, on appeal, Petitioner cited as error the trial court's determination of his competency to stand trial, and the trial court's failure to conduct an appropriate inquiry into whether the defense counsel's potential conflict of interest interfered with the

Petitioner's right to the effective assistance of counsel and his due process right to a fair trial.

REASONS FOR GRANTING THE WRIT

Petitioner urges this Court to issue a writ of certiorari to the United States Court of Appeals for the Fourth Circuit for a number of reasons. First, this case presents important questions of federal law which have not been, but should be, settled by this Court. Second, this case presents questions of federal law upon which the United States Courts of Appeals for various Circuits have rendered conflicting interpretations. Third, the United States Court of Appeals for the Fourth Circuit has decided an important question of federal law that has not been, but should be, settled by this Court, and has decided an important federal question in a way that conflicts with relevant decisions of this Court.

1. IMPEACHMENT BY MEANS OF INQUIRIES RELATING TO PRIOR HOMOSEXUAL ACTS BY THE DEFENDANT, TO THE DEFENDANT'S PRIOR ARREST FOR "CRIMES AGAINST NATURE," AND TO CERTAIN OTHER INSTANCES OF ALLEGEDLY UNLAWFUL CONDUCT OCCURRING TWENTY-SIX (26) YEARS PRIOR TO TRIAL VIOLATED THE FUNDAMENTAL RIGHT TO A FAIR TRIAL IN A FAIR TRIBUNAL.

   A. The trial court erred in permitting the Government to impeach the credibility of the Petitioner through inquiries into the Petitioner's prior arrest for crimes against nature.

At trial, the Government sought to impeach Petitioner's credibility by asking the Petitioner and the Petitioner's two character witnesses about the Petitioner's 1979 "arrest" for crimes against nature. Such questioning, particularly on cross examination of the Petitioner's wife and daughter, is analytically the same as that which occurred in *United States v. Wright,* 968 F.2d 1167 (11th Cir. 1992), and should have been restricted and disallowed pursuant to Rule 608(b) of the Federal Rules of Evidence. Yet, the United States Court of Appeals stated, here, that "this was an ugly tactic . . . prohibited by Fed. R. Evid. 403," *United States v. Person*, slip op. 6, but determined that this "ugly tactic" was harmless error. *Id.*

In *United States v. Wright,* the Defendants alleged as error that the trial judge had excluded the testimony of a high school administrator who would have testified that a government witness had personally admitted to the administrator his involvement in a burglary and such testimony would have impeached the witness trial testimony that he had not committed any burglaries. In affirming the District Court's ruling, the United States Court of Appeals determined that the dean's testimony was squarely prohibited by Rule 608 because it was "extrinsic evidence offered to undermine the credibility of a witness by proof of a specific instance of bad conduct." *Wright*, 968 F.2d at 1170. Although the Defendants also claimed that the evidence showed bias of the witness and was material, the court reasoned that the proffered evidence

would not have contradicted material testimony and the prior uncharged burglary, even if admitted, was not probative of truthfulness. *Id.* at 1170, n.3.

In Petitioner's trial, if the Government had asked whether the Petitioner had been *convicted* of crimes against nature, the question would have undoubtedly been impermissible given Rule 609's prohibition on impeachment by evidence of conviction of a non-*crimen falsi* misdemeanor. By inquiring into the Petitioner's "arrest" for this offense, the Government sought to introduce testimony which the Constitution and the Rules of Evidence carefully exclude. Cross-examination of a defendant, to impeach the defendant by inquiring into a prior arrest, at least where the issue of whether the defendant was subsequently convicted is not explored through further inquiry.[1] *United States v. Ling*, 581 F.2d 1118 (4th Cir. 1978); *United States v. Pennix*, 313 F.2d 524 (4th Cir. 1963); *United States v. Hodnett*, 537 F.2d 828, *rehearing denied*, 540 F.2d 1086 (5th Cir. 1976); *United States v. Labarbera*, 581 F.2d 107 (5th Cir. 1978);

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[1]Admittedly, the rule established by this line of authority is generally applied to prevent inquiry into arrests which did not result in a charge or conviction. However, assuming that a major purpose of the rules of evidence is to aid the jury in its fact finding role, it is immaterial whether or not any subsequent conviction occurred if the jury learns only about the arrest. If an arrest without subsequent conviction cannot be used to impair the credibility of a witness, then inquiries regarding *solely* the defendant's arrest will be no more helpful to the jury. Moreover, at best an arrest is nothing more than assertive conduct of another which is certainly incompetent conclusory hearsay.

United States v. Musgrave, 483 F.2d 327 (5th Cir.), *cert. denied*, 414 U.S. 1023, *cert. denied*, 414 U.S. 1025 (1973); *United States v. Hykel*, 461 F.2d 721 (3rd Cir. 1972). Where, as here, the Government sought to inquire into a prior arrest, without inquiring into the related conviction and confronting the barrier imposed by Rule 609, the Petitioner's right to a fair trial free from prejudice was violated.

Even assuming, *arguendo*, that the Government could inquire solely into the Petitioner's prior arrest, such line of inquiry could only be permissible under Rule 608 of the Federal Rules of Evidence. F. R. Evid., Rule 608 (specific instances of the conduct of a witness, for the purpose of attacking or supporting credibility may be inquired into on cross examination only if probative of truthfulness or untruthfulness). *See also* Advisory Committee Notes, Fed.R.Evid., Rule 608(any specific instances inquired into must "be probative of truthfulness or its opposite and not remote in time").

As the Court of Appeals recognized, where, in this case, the Petitioner was on trial for conspiracy to distribute narcotics, it was clear that Petitioner's *1979* arrest for *crimes against nature* had nothing to do with the matters at trial. Furthermore, given the arrest's remoteness in time, this line of inquiry could not fall within the ambit of specific-instances evidence permitted under Rule 608.

Finally, Rule 608 is subject to Rule 401's requirement that all evidence be *relevant*, to Rule 403's requirement that the probative value of the evidence not be substantially outweighed by the danger of unfair prejudice, and to Rule 611's requirement that witnesses be protected from harassment and undue embarrassment. Advisory Committee Notes, Fed.R.Evid, Rule 608. Here, evidence regarding the Petitioner's 1979 arrest for crimes against nature clearly was not relevant to a determination of his credibility. Even if this Court determines that such evidence *is* relevant, the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. Given the resulting legal irrelevance of this evidence, the trial court should have protected the Petitioner from harassment and undue prejudice by sustaining the Petitioner's objections to this line of inquiry. *Cf., Old Chief v. United States,* 519 U.S. 172 (1997)(Rule 403 considerations must be applied to any extrinsic acts evidence and undue prejudice warrants reversal).

B. Impeachment through inquiry into the *homosexual nature* of the Petitioner's 1979 arrest for crime against nature denied Petitioner's right to a fair trial.

Even if the trial court had not erred in its decision to permit the Government to inquire into the Petitioner's prior arrest, his fundamental right to a fair trial was abridged by the Government's subsequent inquiry into the *homosexual nature* of this arrest. After asking the Petitioner whether it

was "true that you were arrested for soliciting a crime against nature," the Government followed-up the question by asking whether it was true that the offense involved the Petitioner and another man in the park. The admission of this evidence, over the Petitioner's strenuous objection, was erroneous and should not have been permitted.

First, whether the Petitioner's activity was *homosexual* or *heterosexual* in nature is simply inappropriate and irrelevant to any determination with respect to the Petitioner's credibility or to that of any witness. Courts at all levels have consistently held that the homosexuality of the defendant, or of any other witness, cannot be used to impeach credibility. *United States v. Colyer*, 571 F.2d 941 (5th Cir. 1978) *cert. denied*, 439 U.S. 933 (1978); *United States v. Wright*, 489 F.2d 1181 (D.C. Cir. 1973); *United States v. Nuccio*, 373 F.2d 168 (2nd Cir.), *cert. denied*, 387 U.S. 906, *rehearing denied*, 389 U.S. 889 (1967); *Salgado v. United States*, 278 F.2d 830 (1st Cir. 1960); *People v. Hackett*, 365 N.W.2d 120 (Mich. 1984); *State v. Miller*, 485 S.W.2d 435 (Mo. 1972).

Second, even if there is *any* probative value to this evidence, that value is substantially outweighed by the prejudicial effect of such evidence. The prejudicial effect of evidence regarding the homosexual acts or inclinations of a witness or defendant substantially outweighs the probative value of such evidence and, therefore, mandates that the trial court act to insure its exclusion. *See Old Chief*

v. United States, 519 U.S. 172 (1997). This principle is applicable even when the evidence is being offered for purposes other than impeachment, where, arguably, the probative value of such evidence is at its minimum. *Compare, Harris v. Florida,* 183 So.2d 291, 294, (Fla.Ct.App. 1966)(holding that evidence of Defendant's prior homosexual acts "bore with deadly effect upon the character of propensities of the Defendant" and therefore should have been excluded in the Defendant's trial for sexual assault on same-sex victim) *with Kvasnikoff v. Alaska*, 674 P.2d 302 (AK Ct.App.1983) (evidence that the complaining witness in a homosexual rape trial was himself a homosexual was inadmissible even to prove allegation of victim's consent).

Finally, even if the trial court had *not* erred in finding that the probative value of evidence regarding the Petitioner's past homosexual activity was not substantially outweighed by its prejudicial effect, this evidence should have been excluded by virtue of the trial court's duty under Rule 611 of the Federal Rules of Evidence to protect witnesses from harassment and undue embarrassment. *See United States v. McMillon*, 14 F.3d 948 (4th Cir 1994)(co-conspirator in drug conspiracy trial could not be impeached through inquiry as to whether the co-conspirator used drugs to force people to engage in homosexual acts with him, since such inquiry served only to harass or humiliate the co-conspirator).

C. Impeachment through inquiry into misconduct allegedly committed twenty-six years earlier deprived Petitioner of his fundamental right to a fair trial.

At Petitioner's trial, the Government endeavored to impeach the credibility of the Petitioner's two character witnesses, and of the Petitioner himself, by inquiring into uncharged misconduct, "ticket-fixing" allegedly engaged in by the Petitioner, twenty-six (26) years earlier. Even assuming, *arguendo*, that the alleged wrongful conduct was probative of the truthfulness, the alleged incidents are far too remote in time to be admissible under Rule 608.

Initially, the Court seemed startled by the remoteness of the conduct about which the Government sought to inquire.[2] However, seconds later, the trial court judge took a very different view and allowed the prejudicial questioning to continue.

Second, assuming, *arguendo*, that this 26 year old conduct was to some degree probative of the Petitioner's

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[2] "Wait a minute," Judge Fox suddenly remarked, "I think that is a pretty long time ago." Yet, as precipitously, Judge Fox changed his analysis, " When you get into the question of what kind of character does a person have," Judge Fox observed, "he builds his reputation for character. It is built from his entire life. And I think that the question is legitimate."

The trial court's comments suggest a thorough abandonment of the "not remote in time" limitation on Rule 608 -- an abandonment reflected in his subsequent decision to permit the Government to inquire into the Petitioner's 1971 conduct.

credibility, the prejudicial effect of this line of inquiry substantially outweighs its probative value. Through this inquiry, the Government improperly suggested to the jury that the Petitioner was responsible for fixing over five thousand (5000) tickets. Accordingly, because of the grossly prejudicial effect of this evidence the trial court should have excluded such evidence in order to preserve the fair trial in a fair tribunal requisites of due process.

II. THE COURT ERRED AND DENIED PETITIONER'S CONSTITUTIONAL AND STATUTORY RIGHTS BY FAILING TO CONDUCT AN ADEQUATE HEARING INTO THE PETITIONER'S COMPETENCY TO STAND TRIAL, BY ENTERING FINDINGS AS TO THE PETITIONER'S COMPETENCY WITHOUT PERMITTING THE PETITIONER THE RIGHT TO CONFRONT AND CROSS-EXAMINE WITNESSES AGAINST HIM, AND BY ENTERING FINDINGS AS TO THE PETITIONER'S COMPETENCY WHICH THE WEIGHT AND SUFFICIENCY OF THE EVIDENCE DOES NOT SUPPORT.

While the trial court's factual determination of a defendant's competency to stand trial, entered after a hearing on the matter, will generally not be disturbed unless clearly arbitrary or unwarranted, *United States v. Crump*, 120 F.3d 462, 467 (4th Cir. 1997), the separate and distinct question of whether the hearing itself is statutorily and constitutionally sufficient is a question of law subject to *de novo* review. That review, here, establishes that a clear demarcation of the rule is necessary.

A criminal defendant may not be tried unless he is competent. *Godinez v. Moran*, 509 U.S. 389 (1993); *Medina v. California*, 505 U.S. 437 (1992); *United States v. Mason*, 52 F.3d 1286 (4th Cir. 1995). The test of whether a defendant is competent to stand trial is whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has rational, as well as factual, understanding of the proceedings against him. *Dusky v. United States*, 362 U.S. 402 (1960); *United States v. McGinnis*, 384 F.2d 875 (4th Cir. 1967), *cert. denied*, 390 U.S. 990 (1967). The failure of a trial court to provide an adequate determination of the defendant's competency to stand trial violates the defendant's due process rights by depriving the defendant of his constitutional right to a fair trial. *Drope v. Missouri*, 420 U.S. 162, (1975); *Pate v. Robinson*, 383 U.S. 375 (1966).

Congress has established clear guidelines governing when and how a hearing should be conducted to determine a defendant's competency to stand trial. According to 18 U.S.C. § 4241,

> [a]t any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, the defendant or the attorney for the Government may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion, or shall order a hearing on its own motion, if there is reasonable cause to believe

> that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.

18 U.S.C. § 4241(a). Section 4241(c) further provides that any such hearing "shall be conducted pursuant to the provisions of section 4247(d)." 18 U.S.C. § 4241(c).

In Petitioner's case, both he and the Government filed motions pursuant to § 4241(a) for an Order allowing for psychiatric evaluation of the Petitioner. On December 2, 1996, the Honorable James C. Fox entered an Order allowing Petitioner's motion and finding that "there is reasonable cause to believe that the defendant may be presently suffering from a mental disease or defect rendering him mentally incompetent . . ." to stand trial. Judge Fox further directed the Clerk of Court, "upon completion of the psychiatric examination and the filing of the reports, to schedule a hearing in this matter to determine the mental competency of the Defendant." This Order was never rescinded.

On January 6, 1997, Dr. Crummie submitted his report stating that the Defendant may be suffering from a mental disorder rendering him mentally incompetent to stand trial. In his full evaluative report, Dr. Crummie noted that the Defendant "says things that are obviously incorrect," that he has suffered from auditory and visual hallucinations

over the past twenty (20) years, that he is incapable of giving the correct day or date, and that he exhibits poor judgment, rambling speech, diminished memory, and decreased intellectual functions. Dr. Crummie also noted that the Defendant suffered from possible early dementia of the Alzheimer's type.

On January 22, 1997, an Order was entered allowing the Government's motion for psychiatric evaluation of the Petitioner. The Petitioner was subsequently evaluated at Butner Federal Correctional Institution and found to be competent to stand trial.

The Court having found, in its December 2, 1996 Order, that there was "reasonable cause to believe" that the Petitioner was incompetent to stand trial, the Petitioner was entitled by the express language of 18 U.S.C. § 4241(c) to a hearing conducted pursuant to 18 U.S.C. § 4247(d).[3] As the District of Columbia Circuit has noted, in determining a defendant's competency to stand trial, the court's hearing must be "fair and adequate," so as to ensure that the determination is "an informed one." *Blunt v. United States*, 389 F.2d 545 (D.C. Cir. 1967).

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[3] Section 4247(d) provides that, at a hearing ordered pursuant to Section 4241(c), the defendant "shall be afforded an opportunity to testify, to present evidence, to subpoena witnesses on his behalf, and to confront and cross-examine witnesses who appear at the hearing."

Here, the Petitioner was denied *all* of these procedural safeguards. It is impossible to identify in the record anything which can even remotely be described as a competency hearing, at least as Congress intended such hearings to be conducted. On April 21, 1997, the trial court reached its factual determination of the Petitioner's competency in a brief, farcical exchange (reprinted in its *entirety* in the appendix).

The following day, the trial court reiterated -- "to be sure that the record is clear" -- its finding, "based on the information" received from Butner, that the Defendant is competent to stand trial. The Petitioner was given no meaningful opportunity to testify and no opportunity to present evidence, to subpoena witnesses on his behalf, or to confront and cross-examine the examining psychiatrists from Butner. This result obtained despite the fact that the Court's December 2, 1996, order, which was never rescinded, required by its terms that the Court conduct a fair and adequate competency hearing.

The cursory nature of this determination is even more alarming in light of the Petitioner's conduct throughout the trial. On April 23, 1997, counsel for the Petitioner reported to the Court that the Petitioner was "saying things that don't make sense, and talking about his high school football team, and he twitches a lot. And I am concerned that he doesn't know what is going on and understand the implications of what is taking place here." Counsel for the

Petitioner added, "he says things that are not applicable. One minute he will say something that is perfectly competent. And then the next minute he will start talking about the battles in World War II that don't make any sense." Subsequently, the Petitioner insisted that both he and his wife be permitted to testify (despite the advice of counsel). On April 23, 1996, the Petitioner advised his attorney of his decision to plead guilty. However, upon examination by the Court, the Petitioner failed to respond when asked whether he committed the offense charged in the indictment. On the final day of trial, the Petitioner told his attorney that he had been informed by an FBI agent that his attorney was conspiring with the Justice Department to have him found guilty.

Despite this bizarre conduct, the Court never conducted any hearing -- or made any genuine effort -- to determine whether the Petitioner was competent to stand trial. This Court has held that due process imposes upon the trial court a *continuing duty* to insure that the defendant is competent to stand trial. *Drope v. Missouri*, 420 U.S. at 181, 95 S.Ct. at 908. Here, the Petitioner's own attorney raised genuine concerns about the competency of her client. As the Seventh Circuit has noted, "Who but the defendant's attorney knows best if the accused is able to assist in his own defense?" *United States v. Morgano*, 39 F.3d 1358, 1374 (7th Cir. 1994) *cert. denied*, *Palermo v. United States*, 515 U.S. 1133 (1995). Yet, the trial court dismissed Petitioner's counsel's concerns summarily.

The Petitioner was statutorily and constitutionally entitled to an adequate and fair hearing[4] to determine whether he was competent to stand trial. Having been denied such a hearing, and the Court of Appeals having affirmed, review is mandated.

III. THE DISTRICT COURT ERRED AND DENIED THE DEFENDANT HIS CONSTITUTIONAL RIGHT TO DUE PROCESS BY FAILING TO CONDUCT AN EVIDENTIARY HEARING INTO WHETHER COUNSEL'S POTENTIAL CONFLICT OF INTEREST WOULD INTERFERE WITH THE DEFENDANT'S RIGHT TO A FAIR TRIAL AND BY FAILING TO ENSURE THAT THE DEFENDANT HAD KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY WAIVED HIS RIGHT TO BE REPRESENTED BY COUNSEL WHO IS WITHOUT CONFLICT OF INTEREST.

In powerful and unwavering language, the United States Court of Appeals for the Fourth Circuit asserted that "the relationship between an attorney and his client is a sacred one," *United States v. Schell*, 775 F.2d 559, 565 (4th Cir. 1985) *cert. denied*, 475 U.S. 1098 (1986), but retreated from that statement by its holding in this case. Despite this retreat, at a minimum, the sacred nature of this relationship means that a client is entitled to the undivided

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[4]Petitioner was entitled to his *own* counsel, at a critical stage in the proceeding, as a part of his entitlement to an adequate and fair hearing. *Compare, Powell v. Alabama,* 287 U.S. 45 (1932) *with United States v. Barfield*, 969 F. 2d 1554 (4th Cir. 1992). Yet, here, neither a full and adequate hearing was conducted to determine his competency nor to determine whether the attorney appointed to represent him at trial labored under a conflict of interest.

loyalty of his attorney and to be free from the fear that his attorney's duties to a third-party will interfere with his attorney's duty to zealously provide for his defense.

The Sixth Amendment to the United States Constitution guarantees to all criminal defendants the right to effective assistance of counsel. Even the United States Court of Appeals for the Fourth Circuit, following the Supreme Court of the United States, has held that a necessary corollary to this right to effective assistance of counsel is the right to representation free from conflicts of interest. *United States v. Swartz*, 975 F.2d 1042, 1047 (4th Cir. 1992), *citing Wood v. Georgia*, 450 U.S. 261 (1981).

This right to representation free from conflicts of interest may be impinged in two theoretically distinct but practically identical types of conflicts. First, a conflict may emerge when an attorney provides joint representation to two or more defendants charged with an offense arising out of the same act or transaction or out of the same series of acts or transactions. In this circumstance, Rule 44(c) of the Federal Rules of Criminal Procedure requires a presiding Judge to make inquiry into the joint representation and to advise the defendants of their rights to effective assistance of counsel, including separate representation. Rule 44(c) of the Federal Rules of Criminal Procedure provides, in pertinent part, that

> [w]henever two or more defendants have been jointly charged pursuant to Rule 8(b) or have

> been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of the right to the effective assistance of counsel, including separate representation.

Fed.R.Crim.P., Rule 44(c). The Rule is "designed to protect a defendant's sixth amendment right to counsel when two or more defendants are represented by the same counsel." *United States v. Akinseye*, 802 F.2d at 740, 744 (4th Cir. 1986), *cert denied*, 482 U.S. 916 (1987).

When a criminal defendant is represented by counsel under the circumstances described in Rule 44(c) and the defendant purports to waive his or her right to representation free from conflict of interest, the Rule imposes upon the Court a duty to make full and adequate inquiry to ensure that the defendant's purported waiver is knowing, intelligent, and voluntary. For a waiver to be knowing, intelligent, and voluntary, Rule 44(c) of the Federal Rules of Criminal Procedure compels the Court to conduct a formal hearing into the purported waiver.

> The court must personally address each defendant and inform him of the potential hazards of representation by a single attorney, as well as his right to separate representation. In turn, the defendants are free to ask the court questions about the nature and consequences of the representation: Most significantly, the court

> should seek to elicit a narrative response from each defendant that he has been advised of his right to effective representation, that he understands the details of his attorney's possible conflict of interest and the potential perils of such a conflict, that he has discussed the matter with his attorney and if he wishes with outside counsel, and that he voluntarily waives his Sixth Amendment Protections.

United States v. Gilliam, 975 F.2d 1050, 1053 (4th Cir. 1992).

Second, a conflict of interest may emerge in cases of successive representation of co-defendants. In *United States v. Young*, the United States Court of Appeals for the Fourth Circuit vacated a trial court's judgment and remanded the case for an evidentiary hearing to determine whether an actual conflict existed and defendant's constitutional right to fair trial had been infringed where the trial court failed to conduct such an evidentiary hearing, after the defendant objected that his attorney had formerly represented a co-defendant in the matter. The Court held that

> [a]lthough successive representation of co-defendants differs chronologically from multiple representation of co-defendants by the same lawyer, the possibility of a conflict of interest is not dispelled by the termination of the former lawyer's services. The lawyer may have received confidential information from his former client that is detrimental to that client but favorable to the lawyer's present client. In this event, a

> conflict of interest arises that is not substantially different from that which may occur in instances of multiple representation.

United States v. Young, 644 F.2d 1008, 1012 (4th Cir. 1981). Further, the Court ruled that in situations of successive representation of co-defendants, when a defendant raises an objection regarding the existence of a possible conflict of interest, the trial court must hold an evidentiary hearing to determine whether the potential conflict infringes the defendant's right to a fair trial. "When the defendant shows that an actual conflict of interest resulting from the successive representation affected his right to a fair trial, he need not demonstrate prejudice." *Id.*

It is *irrelevant*, for the purposes of this analysis, whether the successive representation in question arose out of representation of two defendants charged in the same indictment or out of representation of two defendants charged in separate indictments.[5] Under the "substantial relationship test", an attorney may not represent a client against a former client if the subject matter of the litigation

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[5] Given the fact that the charge against the Petitioner was substantially related to the earlier charge against Sheppard, indeed they are charged with being members of the *same* conspiracy, the fact that Petitioner's trial counsel, Stubbs, represented a co-defendant, Sheppard, on charges contained in an earlier indictment charging participation in the same conspiracy is irrelevant to the determination of whether a conflict of interest exists, at least where the earlier indictment is substantially related to the subject matter contained in the subsequent indictment.

is substantially related. *Rogers v. Pittston Coal Co.*, 996 F. 2d 1212 (4th Cir. 1993); *W.R. Grace & Co. v. Gracecare, Inc.*, 152 F.R.D. 61, 65 (D.MD. 1993).

Here, Petitioner's trial counsel, Alice Stubbs, represented Jerry Sheppard, a co-defendant, who was convicted for his involvement in the exact same conspiracy with which the Petitioner had been charged. Petitioner alleged that Sheppard revealed to Stubbs information exculpating the Petitioner. Stubbs' prior attorney-client relationship with Sheppard barred her from revealing, using, or eliciting any of that information.

Consequently, due process and the requisites of Sixth Amendment analysis require, in clear and unequivocal terms, that, at a minimum, the trial court conduct an evidentiary hearing when a defendant raises an objection regarding the existence of a potential conflict of interest. In the case at bar, no such evidentiary hearing was ever conducted, presumably because the Court concluded that the "waiver" of conflict was facially sufficient to obviate the need for a proper inquiry.[6]

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[6] On September 30, 1996, Alice Stubbs filed a "Motion to Appear as Counsel of Record." In support of the motion, Stubbs asserted that she had a "potential conflict due to her prior representation of co-defendant Sheppard." She further asserted that by signing this motion the Petitioner, Marion Brooks Person, had waived his constitutional right to be represented by counsel free from conflict of interest. In the motion, Stubbs requested that the Court conduct a hearing to determine whether the Petitioner had made a knowing and informed waiver of any and

Although the Petitioner *did* sign the motion for Stubbs to appear as his trial attorney, purportedly containing a waiver of a conflict of interest, such waiver is wholly without effect unless the Court makes an appropriate determination as to whether the Petitioner has knowingly, intelligently, and voluntarily waived his rights. Even the United States Court of Appeals for the Fourth Circuit has been unequivocal in holding that, although a defendant may waive his right to conflict-free representation, such waiver must be "knowing, intelligent, and voluntary." *United States v. Gilliam*, 975 F.2d at 1050; *United States v. Swartz*, 975 F.2d at 1049; *United States v. Akinseye*, 802 F.2d at 745 (4th Cir. 1986), *cert. denied*, 482 U.S. 916 (1987). "Whether there has been a waiver depends on the particular facts of each case and the court must make as thorough and long an inquiry as necessary to determine whether the accused is voluntarily, knowingly and intelligently waiving his right." *Hoffman v. Leeke*, 903 F.2d 280, 288 (4th Cir. 1990).

Without conducting such a hearing to determine whether the Petitioner's right to a fair trial would be infringed, the trial court granted the motion to appear as counsel of record on October 4, 1996. At this point, with Alice Stubbs having revealed to the Court the existence of a potential conflict of interest, the trial court was required, at a minimum, to conduct an evidentiary hearing to determine whether this potential conflict might infringe upon the Petitioner's right to a fair trial. *Cf., Wheat v. United States*, 486 U.S. 153, 160-161 (1988)(when alerted to potential conflict, court must take adequate steps to prevent prejudice from actual conflict). Instead, the trial court summarily signed an order allowing Stubbs to appear as attorney of record.

"[A] court confronted with and alerted to possible conflicts of interest must take adequate steps to ascertain whether the conflicts warrant separate counsel." *Wheat v. United States*, 486 U.S. 153, 160 (1988) *citing Cuyler v. Sullivan*, 446 U.S. 335 (1980). Therefore, although this case may not be governed explicitly by Rule 44(c)[7], the procedural precautions required by Rule 44(c) should, and must be applied to cases, like that at bar, of successive representation. The conflict of interest which arises in the case of successive representation is "not substantially different from that which may occur in instances of multiple representation," *United States v. Young*, 644 F.2d at 1012, and "multiple representation of criminal defendants engenders special dangers of which a court *must be aware*." *Wheat v. United States*, 486 U.S. at 159 (emphasis added). Accordingly, a purported waiver of a defendant's right to counsel free from conflict of interest in such cases should be subjected to the same searching inquiry[8] as required under Rule 44(c).

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[7] Insofar as it does not involve charges brought pursuant to F. R. Crim. P., Rule 8(b) or joined pursuant to Rule 13, Rule 44(c) does not by its express terms govern the circumstances, here. However, this Petition seeks a demarcation of the parameters of the application of the principles upon which the rule is based.

[8] In *Wheat v. United States*, 486 U.S. 153, 161 (1988), Chief Justice Rehnquist pointed out that

[a]lthough Rule 44(c) does not specify what particular measures may be taken by a district court, one option suggested by the Notes of the Advisory Committee is an order by the court that the defendants be separately represented in subsequent proceedings in the case. 18 U.S.C.App. p. 650. This suggestion comports with

Indeed, the Petitioner's right to a hearing to determine whether his purported waiver was knowingly, intelligently, and voluntarily made was so evident that counsel whose conflict of interest Petitioner asserted at trial and on appeal, specifically requested such a hearing in her Motion to Appear as Counsel of Record. Instead, the trial court granted the motion *without* ever holding the requested hearing.

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our instructions in *Holloway* and in *Glasser v. United States*, 315 U.S. 60 (1942), that the trial courts, when alerted by objection from one of the parties, have an independent duty to ensure that criminal defendants receive a trial that is fair and does not contravene the Sixth Amendment.

Accordingly, in Petitioner's case, in order to establish that the Petitioner's purported waiver was knowingly, intelligently, and voluntarily made by: (1) personally addressing the defendant and informing him of the potential hazards of representation by an attorney with a potential conflict of interest as well as of his right to representation by someone free of such conflict; (2) entertaining questions from the defendant about the nature and consequences of the representation; (3) eliciting a narrative response from the defendant that he has been advised of his right to effective representation, that he understood the details of his attorney's possible conflict of interest and the potential perils of such a conflict, that he has discussed the matter with his attorney and if he wishes with outside counsel, and that he voluntarily waives his Sixth Amendment protections. Instead, the trial court made no such inquiry.

Indeed, not only did the trial court never discuss the purported waiver with the Petitioner but, according to the record, the trial court reached the conclusion that "Mr. Person plainly waived any conflict of interest and signed a waiver to that effect" *before* even considering the Petitioner's motion to disqualify his attorney and to have a new attorney, free from conflicts of interest, appointed. A hearing to determine the validity of the purported waiver was essential, especially given the existence of serious doubts as to the Petitioner's competency.

Particularly in the absence of a proper hearing and inquiry with respect to the issue, a finding of a right to counsel deprivation is compelled when a defendant demonstrates that an actual conflict of interest existed. *See United States v. Gilliam*, 975 F.2d at 1053. The existence of an actual conflict of interest is never harmless error. *United States v. Swartz*, 975 F.2d at 1048 (4th Cir. 1992), *citing Glasser v. United States*, 315 U.S. 60, 76 (1942). Indeed, "when counsel for a defendant in a criminal case has an actual conflict of interest when representing the defendant and the conflict adversely affects counsel's performance in the defense of the defendant, prejudice to the defense is presumed and a new trial must be ordered. . . . Legal representation which is adversely affected by actual conflicts of interest[9] is never considered harmless

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[9] This actual conflict may emerge when an attorney's continuing duty to former clients interferes with his consideration of all facts and options for his current client. *United States v. Tatum*, 943 F.2d at 376. The superseding indictment of the Petitioner alleges that the Petitioner "together with . . . Jerry Sheppard . . . did knowingly and intentionally combine, conspire, confederate, agree and have a tacit understanding with each other . . . to commit offenses against the United States." As Petitoner's trial counsel, Alice Stubbs, acknowledged in her motion to Appear as Counsel of Record, she represented Sheppard during Sheppard's trial for conspiracy to distribute and possess with intent to distribute marijuana and cocaine. Sheppard was convicted for his involvement in the same conspiracy in regard to which Petitioner was charged with participation. Jerry Sheppard, unlike six (6) of the other nine (9) individuals listed as co-conspirators in the Petitioner's superseding indictment, did not testify at the Petitioner's trial. Stubbs could not have called Sheppard as a witness without interfering with her duties toward her former client. Any attempt to elicit testimony from Sheppard threatened to reveal confidential information conveyed to Stubbs

error." *United States v. Tatum*, 943 F.2d 370, 375 (4th Cir. 1991).[10]

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by Sheppard in reliance upon their "sacred" attorney-client relationship. At the same time, the failure to elicit all exculpatory information would have violated Stubbs' duty towards the Defendant.

[10] As this Court has properly pointed out,

> Joint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing. . . . [A] conflict may . . . prevent an attorney from challenging the admission of evidence prejudicial to one client but perhaps favorable to another, or from arguing at the sentencing hearing the relative involvement and culpability of his clients in order to minimize the culpability of one by emphasizing that of another.

Holloway v. Arkansas, 435 U.S. 475, 489-490 (1978).

In determining whether there has been an adverse effect, the Court may look not only to the affirmative actions of counsel but also to the failure of counsel to take certain actions. *United States v. Tatum*, 943 F.2d at 376. In the case at bar, defense counsel's representation was plagued by repeated failures to act. Although Sheppard was then serving an eighteen (18) year prison term for his involvement in the conspiracy, the Government elected not to call Sheppard as a witness.

Whether the Government's decision stemmed from its belief that Sheppard would provide testimony exculpatory of the Petitioner is unclear. What *is* clear, however, is that Stubbs would have been unable to call Sheppard as a witness or even to cross examine him if he had testified for the Government without conflict.

Indeed, throughout the trial, Stubbs never once elicited testimony regarding Sheppard's involvement. Nor did she choose to cross-examine Charles Glenn Parker, Johnny Dean Faircloth, or Clyde Murray Smith regarding their testimony that the Petitioner provided Sheppard with fictitious licenses.

CONCLUSION

Because impeachment of a testifying defendant and of his character witnesses by means of inquiries relating to prior homosexual acts by the defendant, to the defendant's prior arrest for "crimes against nature," and to certain other instances of allegedly unlawful conduct occurring twenty-six (26) years prior to trial violates the fundamental right to a fair trial in a fair tribunal, and the opinion of the Court of Appeals conflicts with the decisions of the State and Federal Courts in other circuits holding that the homosexuality of the defendant, or of any other witness, cannot be used to impeach credibility, review in this case is necessary. The introduction of such evidence and the Court's failure to recognize the mandate of exclusion under Rule 403 conflicts with this Court's ruling in *Old Chief v. United States*, 519 U.S. 172 (1997) as well as the weight of other authority.

The trial court's failure or refusal to conduct an evidentiary hearing which included an opportunity for confrontation of the witnesses concerning the Petitioner's competency denied petitioner's constitutional and statutory rights. Because of the frequent occurrence of claims with respect to capacity to proceed, this case presents important

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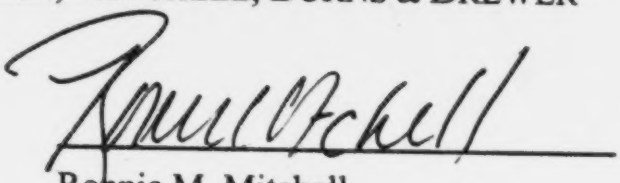
Furthermore, in Petitioner's *pro-se* motion to disqualify filed on the threshold of the trial on April 17, 1997, the Defendant pointed to twenty-four (24) separate motions that Stubbs refused to file in this action. At least four (4) of those motions were designed to elicit information regarding statements or testimony by, or information known to, Jerry Sheppard.

questions of federal law which have not been, but should be, settled by this Court.

Because this Court has held that a trial court has an affirmative or independent duty when alerted by objection from a defendant to ensure that criminal defendants receive a trial that is fair and does not contravene the Sixth Amendment, the opinion of the Court of Appeals for the Fourth Circuit squarely conflicts with the decisions of this Court. Although this case is not expressly circumscribed by Rule 44(c) of the Federal Rules of Criminal Procedure, the procedural precautions required under the principles underlying that rule and under the rationale of the decisions of this Court, including *Wheat v. United States* 486 U.S. 153 (1988), *Holloway v. Arkansas*, 435 U.S. 475 (1978) and *Glasser v. United States*, 315 U.S. 60 (1942), should be held to be applied to such circumstances. Because of both the conflict with the decisions of this Court and the need to resolve the question of the ambit of the principles governing successive representation and the right to the effective assistance of counsel under the Sixth Amendment, the issuance of a writ of certiorari to effect such review is essential.

Dated: May 30, 2000

HARRIS, MITCHELL, BURNS & BREWER

By: 

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Appendix

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205 F.3d 1336 (Table)
Unpublished Disposition

(Cite as: 205 F.3d 1336, 2000 WL 223336 (4th Cir.(N.C.)))

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA4 Rule 36 for rules regarding the publication and citation of unpublished opinions.)

UNITED STATES of America, Plaintiff-Appellee,
v.
Marion Brooks PERSON, Defendant-Appellant.

No. 97-4599.

United States Court of Appeals, Fourth Circuit.

Argued Nov. 30, 1999.

Decided Feb. 28, 2000.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. James C. Fox, District Judge. (CR-96-140-F).

Ronnie Monroe Mitchell, Harris & Mitchell, Fayetteville, NC, for appellant.

John Stuart Bruce, Office of the United States Attorney, Raleigh, NC, for appellee.

ON BRIEF: Janice McKenzie Cole, United States Attorney, Anne M. Hayes, Assistant United States Attorney, Jane J. Jackson, Assistant United States Attorney, Raleigh, NC, for appellee.

Before WILLIAMS and MICHAEL, Circuit Judges, and HAMILTON, Senior Circuit Judge.

OPINION

PER CURIAM.

****1 Marion Brooks Person appeals his conviction and sentence for conspiracy to distribute cocaine and marijuana in violation of 21 U.S.C. § 846. He argues (1) that several evidentiary rulings were erroneous, (2) that the proceedings to determine his competence were inadequate, (3) that his lawyer labored under a conflict of interest, and (4) that he was improperly sentenced. Finding no reversible error, we affirm.**

I.

The government offered evidence of the following. From 1988 to 1995 Person helped members of Charles Parker's drug organization obtain drivers' licences in false names from the North Carolina Division of Motor Vehicles (DMV). Parker and some twenty others operated a North Carolina drug ring that distributed large amounts of cocaine and marijuana imported from Mexico. Parker's people needed fake identification in order to conceal their true identities from the police. In 1988 one of Parker's

lieutenants, Johnny Faircloth, introduced Person to Parker as a man with "connections" at the DMV, who could fake drivers' licenses. From that time forward, Person helped Parker and a number of his associates obtain fake licenses from the DMV. Person was well paid for his assistance, receiving anywhere from $500 to $1,000 per license. Most important, Person was told repeatedly why Parker and his cohorts needed licenses in false names: fake identification would reduce their chances of being caught. Person's help was instrumental to the success of the drug ring. Armed with the fake licenses arranged through Person, several members of the ring, including Parker himself, passed through the hands of police and local courts without detection.

Two examples illustrate the extent of Person's collaboration with Parker's organization. In the fall of 1988 Parker instructed Faircloth to arrange a meeting with Person to see about getting a fake driver's license for Duane Stone, one of Parker's drug suppliers. Shortly thereafter, Parker, Faircloth, and Stone himself went to meet Person at his home. Person gave Stone a fake birth certificate and a bogus family Bible to present to the DMV as identification. In addition, Person made arrangements to influence the DMV examiner who would be asked to process Stone's bogus application: Person brought a woman to the DMV office to provide sex for the examiner, and Person instructed Parker, Faircloth, and Stone to buy steaks and liquor for the examiner. Stone was issued a driver's license in a fake name, and Person was paid $500 for his help. In the early 1990s Clyde Smith, another member of Parker's organization, arranged for Person to stop by his auto shop to discuss overall arrangements for obtaining fake drivers' licenses. At this meeting Person and Smith decided that the fake licenses would cost $2,000.

Further, the two agreed that they would split the $2,000 payment for each license three ways: they would each get $800 and the DMV examiner would get $400. Smith and Person spoke openly about how the fake licenses would allow Parker's organization to elude the police. Indeed, Person bragged to Smith about the quality of the licenses; he assured Smith they would "hold up" under an arrest.

****2 At least five members of Parker's organization, including Parker himself, testified that they used the fake licenses to avoid arrest as they carried on their drug trafficking activity. All testified that they obtained their fake licenses through Person. Finally, a search of Person's home turned up a wealth of supplies necessary to carry out the fake licensing scheme. These included blank military discharge forms, blank power of attorney forms, and blank birth certificates.**

Person presented a defense. His wife, Peggy, and his daughter, Catherine Bond, testified for him as character witnesses. Both testified that Person was "highly respected" in the community. In addition, Ms. Bond said that she had never known of her father to engage in "any illegal conduct" or "in any drug activity." On cross-examination Mrs. Person admitted that Person had resigned as Clerk of the Superior Court of Cumberland County, North Carolina, after he was accused of fixing traffic tickets, and Ms. Bond admitted that her father resigned in the wake of allegations of ticket fixing. Mrs. Person and Ms. Bond both admitted knowing that Person had been arrested for solicitation of a crime against nature. (Prior to trial the district court had denied Person's motion in limine to block the government from inquiring (1) about his 1979 arrest and conviction for soliciting a crime against nature and (2) about any allegations of improper conduct

while he was clerk.)

Person also took the witness stand. He denied the charges and specifically denied assisting any of the government wiesses in obtaining false drivers' licenses. In addition, he claimed that he did not know that any of the government witnesses had been involved in illegal drug trafficking. Finally, he denied taking any money. On cross-examination the government asked Person about his prior arrest:

Q: Isn't it true that you were arrested for soliciting a crime against nature?

A: The record speaks for itself: Yes.

Q: And that was you and another man in the park?

Ms. Stubbs: Objection.

The Court: The objection is overruled.

The Witness: The record speaks for itself. I don't recall.

After Person testified on direct that he had resigned as Clerk of the Superior Court of Cumberland County because of "some problems," the government followed up with this cross-examination:

Q: Mr. Person, you had to resign as the Clerk of Superior Court in Fayetteville, it is alleged that you fixed over 5,000 tickets, isn't it?

A: That is absolutely false. It was 12.

Ms. Stubbs: Objection.

The Court: The objection is overruled.

At the conclusion of the trial the jury found Person guilty of one count of conspiracy to possess with intent to distribute cocaine and marijuana. Person appeals, raising several issues.

II.

Person contends that the district court erred when it allowed the government to cross-examine his character

witnesses (and later Person himself) about his 1979 arrest for soliciting a crime against nature and his resignation as Superior Court Clerk of Columbia County. He raises specific objection to the implication of some of the questions on these subjects that were asked of him. He says that it was highly improper for the government to suggest that the 1979 arrest involved a homosexual encounter and that the government had no grounds to suggest that he had fixed as many as 5,000 tickets when he was clerk. Person claims that this entire line of cross-examination violated several of the Federal Rules of Evidence, including Rules 401, 403, 608, 609, and 611. The essence of Person's claim is that the evidence elicited by this questioning was so unfairly prejudicial that it should have been excluded under Rule 403 and that it violated the prohibition in Rules 608 and 609 against the use of prior bad acts or crimes to attack credibility.

**3 Person's argument that Rules 608 and 609 govern the propriety of the character questions put to his wife and daughter by the government is misplaced. Person's wife and daughter both testified that he was highly respected in the community, and the daughter testified that, to her knowledge, he had never done anything illegal. Once Person put his character in issue through the testimony of his wife and daughter, the Federal Rules of Evidence permitted the government to ask the wife and daughter about specific instances of Person's conduct that were inconsistent with a good reputation. See Fed.R.Evid. 404 and 405; United States v. Moore, 27 F.3d 969, 974 (4th Cir.1994). Specifically, it was proper for the government to ask the wife and daughter whether they knew about Person's prior arrest, even though it was remote in time. The daughter, after all, had testified on direct that Person had never done anything illegal. Asking the character

witnesses on cross- examination whether they were aware that Person had resigned as clerk amidst allegations of ticket fixing was likewise proper because it too was relevant to the issue of character.

We turn to the cross-exmination of Person. Even assuming it was improper to ask Person (1) whether he had been arrested for solicitation or (2) whether he resigned as Superior Court Clerk under a cloud, the information was already before the jury through the proper examination of Person's wife and daughter. It was also harmless because of the overwhelming direct evidence against Person. Person nevertheless argues that some of the details sought by the government in this line of questioning were prejudicial.

Specifically, Person asserts that the district court erred in allowing the government to ask him on cross-examination whether his 1979 arrest for soliciting a crime against nature involved him and another man. The government thus implied that Person was involved in a homosexual encounter. This was an ugly tactic that is prohibited by Fed.R.Evid. 403. See United States v. Ham, 998 F.2d 1247, 1252 (4th Cir.1993). Moreover, whether a homosexual encounter led to Person's arrest in 1979 has nothing to do with proving that he arranged (ten or more years later) for the issuance of bogus drivers' licenses to aid a drug conspiracy. We must decide whether allowing a question that implied homosexual activity was harmless error. Again, we conclude that it was harmless because of the wall of testimonial and physical evidence against Person. As our discussion of the facts reveals, see part I, supra, several witnesses testified in detail about Person's successful efforts to obtain the fake licenses, which he knew were used to facilitate drug trafficking. Moreover, a wealth of blank documents needed to carry out the scheme

were found in the search of Person's home. The strength of this evidence renders the improper question harmless.

Person also argues that he was prejudiced when the government was allowed to ask him whether he had been accused of fixing 5,000 tickets when he resigned as clerk. Person answered that he was accused of fixing twelve, although it appears that the number might have been in the hundreds. While the government has a duty to avoid suggestions that are intentionally misleading, any overstatement here did not prejudice Person in the end. As we have said, the evidence against him was overwhelming.

III.

**4 Person contends that the district court erred when it determined he was competent and when it denied him an evidentiary hearing on the issue. Prior to arraignment and trial the district court granted the motions filed by Person and the government to have Person examined for competency. Person's long-time family doctor submitted a report stating that Person was incompetent to stand trial. Person was examined by doctors at the Butner Federal Correctional Institution, and they found him to be competent. After a colloquy with Person and a review of the doctors' reports, the district court found him competent to enter a plea.

Person contends that once he underwent a competency evaluation the district court was required to hold an evidentiary hearing. Person simply misunderstands the relevant statutory framework. A court is required to hold a hearing only "if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent." 18

U.S.C. § 4241(a). See also United States v. West, 877 F.2d 285, 285 n. 1 (4th Cir.1989). The district court found that Person was competent based on its discussion with him and its evaluation of the doctors' reports. Person did not request an evidentiary hearing at the time, and the court did not have reasonable cause to hold one.

Person also contends that the circumstances do not support the district court's finding that Person was competent. Again, t finding was based on the court's own discussion with Person as well as the doctors' reports. Moreover, when Person's lawyer reported on one occasion during trial that Person was saying some things that did not make sense, the court discussed the matter with counsel for both sides and referred again to the report from the doctors at FCI Butner, who had concluded that Person was competent. We find no error in the district court's handling of the competency issue.

IV.

Person claims that his lawyer labored under a conflict of interest that requires either a new trial or at least a hearing to determine if his defense was prejudiced by the conflict. Person's lawyer had represented one of Person's co-conspirators in an earlier trial. Prior to his trial Person signed a statement waiving any potential conflict of interest. Moreover, on two occasions before trial the district court asked Person whether he was aware that his lawyer had represented another member of the Parker drug ring in an earlier case and whether Person was satisfied with his lawyer's representation. Both times, Person replied that he was aware of the prior representation and that he was satisfied with his lawyer's work. In particular, he said that she was doing "a good

job." In these circumstances, we reject Person's conflict claim.

V.

Person argues that the district court erred in denying his motion for judgment of acquittal on the ground that the evidence was insufficient to prove that he knowingly joined and participated in a drug conspiracy. The district court was correct. The evidence was sufficient for the jury to conclude that Person was told that fake licenses were needed to facilitate the operation of Parker's drug ring. With this knowledge, Person became a part of the conspiracy when he began assisting its members in obtaining fake licenses.

VI.

****5 Finally, Person alleges that the district court erred in not adjusting his sentence downward four levels pursuant to U.S.S.G. § 3B1.2(a) for being a "minimal" participant in the conspiracy. This claim is totally without merit. The court adjusted Person's sentence downward two levels pursuant to U.S.S.G. § 3B1.2(b) for being a "minor" participant. That was sufficient. His role was too important to be described as "minimal."**

VII.

The judgment of the district court is affirmed.

AFFIRMED.

Trial Transcript Entries With Regard to Disposition of Defendant's Competency

THE COURT: "You understand that having been sworn, that your answers to the court will be subject to the penalties of perjury -- that is to say, of making a false statement under oath if you do not answer truthfully? Do you understand that?"

THE DEFENDANT: "Yes, sir."

THE COURT: "How old are you?"

THE DEFENDANT: "72 this September."

THE COURT: "How far did you go in school?"

THE DEFENDANT: "I have got a Master's degree in social work."

THE COURT: "Let the record reflect that based upon the Court's prior questions to Defendant and his counsel, the Court finds as a fact that the Defendant is competent to plead. For the record, the court, based upon the prior questions of the court to the Defendant and his counsel, and also upon the evaluation received from FCI Butner, the psychiatric evaluation of Mr. Person, the Court finds as a fact that he is competent to plead at this time."

Trial Transcript Entries With Regard to Disposition of Defendant's Objections and Efforts to Disqualify Counsel

On April 21, 1997, the trial court dispensed with the Defendant's Pro-Se motion in the following exchange:

THE COURT: "All right, Sir. You have a motion pending before the Court. You want to disqualify Ms. Stubbs. Did you want her to help you or not to help you?"

THE DEFENDANT: "Help me."

THE COURT: "You want her to help you? All right. In that case, your motion for disqualification is moot. You agree?"

THE DEFENDANT: "Yes, sir."

THE COURT: "And it is therefore denied."

On April 22, 1996, the day after the above exchange, the trial court again addressed the question of the Defendant's motion to disqualify and to have counsel without conflict of interest appointed. The exchange was as follows:

THE COURT: "Now, yesterday, I asked Mr. Person

if he wanted you to assist him. And he indicated that he did. And I presume from that, he wanted to withdraw his motion to disqualify you as his counsel. Is that what you wish to do, Mr. Person? You had filed a motion to disqualify Ms. Stubbs. Do you want to withdraw that motion?"

THE DEFENDANT: "Yes, sir. I think she is doing a good job for me."

On April 25, 1997, after further objection, the trial court called the Defendant to the stand and dispensed with the Defendant's objections in a brief exchange which is fully reprinted as follows:

THE COURT: "Mr. Person, can you hear me all right?"

THE DEFENDANT: "Yes, sir."

THE COURT: "Do you want Ms. Stubbs to continue to assist you in this case? Do you want her to continue to assist you?"

THE DEFENDANT: "I can't do it by myself."

THE COURT: "We are ready to go. I am going to bring the jury in."